No. 02-523

Supreme Court U.S.
FILED
NOV 1 2002
OFFICE OF THE CLERK

In The
Supreme Court of the United States

RUSSELL J. HENDERSON, DOREEN KEELER, ROBERT H. LOEWY, and GREATER NEW ORLEANS SECTION OF THE NATIONAL COUNCIL FOR JEWISH WOMEN,

Petitioners,

v.

RICHARD L. STALDER, Secretary, Department of Public Safety and Corrections, and JOHN KENNEDY, State Treasurer,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

RICHARD P. IEYOUB
Attorney General
of Louisiana

THOMAS S. HALLIGAN
Assistant Attorney
General (La.)

ROY A. MONGRUE, JR.
Assistant Attorney
General (La.)
(Counsel of Record)

LOUISIANA DEPARTMENT OF JUSTICE
Civil Division
P. O. Box 94005
Baton Rouge, LA 70804-9005
Telephone: (225) 342-7013

Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

	Page
Table of Authorities	ii
Statement of the Case	1
Argument: Reasons for Denying the Writ	4
Petitioners Erroneously Interpret The State Statute	4
Petitioners Question Number 1	9
Petitioners Question Number 2	11
Petitioners Question Number 3	24
Conclusion	29
Appendix	App. 1

TABLE OF AUTHORITIES

Page

CASES:

FEDERAL:

Arkansas Educational Television Commission v. Forbes, 523 U.S. 666 (1998) 13, 15

Bob Jones University v. U.S., 461 U.S. 574 (1983) 8

Casey v. Planned Parenthood of SE Penn., 505 U.S. 833 (1992) 21

Flast v. Cohen, 392 U.S. 83 (1962) 25

Harris v. McRae, 448 U.S. 297 (1980) 9

Henderson v. Stalder, 112 F.Supp.2d 589 (USDC, La. E.D. 2001) 22

Henderson v. Stalder, 287 F.3d 374 (U.S. App. 5th Cir. 2002) 25, 27, 28, 29

Knights of the Ku Klux Klan, et al. v. Curators of the University of Missouri, et al., 203 F.3d 1085 (U.S. App. 8th Cir. 2000) 15

Legal Services Corp. v. Velazquez, 531 U.S. 533 (2001) 17

Lewis v. Wilson, 89 F.Supp.2d 1082 (USDC, Mo. E.D. 2000) 17

Maher v. Roe, 432 U.S. 464 (1977) 9, 21

Poelker v. Doe, 432 U.S. 519 (1977) 9, 21

Pruitt v. Wilder, 840 F.Supp. 414 (USDC, Va. E.D. 1994) 17

Rosenberger v. Rectors and Visitors of the University of Virginia, et al., 515 U.S. 819 (1995) 13, 14

Rust v. Sullivan, 500 U.S. 173 (1991) 9, 13, 17, 21, 25

TABLE OF AUTHORITIES – Continued

Page

Sons of Confederate Veterans, Inc. v. Comm'r of Va. DMV, 288 F.3d 610 (U.S. App. 4th Cir. 2002).....19

Sons of Confederate Veterans, Inc. v. Glendening, 954 F.Supp. 1099 (USDC, Md., 1997).....18

Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464 (1982).....29

Webster v. Reproductive Health Services, 492 U.S. 490 (1989).....9, 21

Wooley v. Maynard, 430 U.S. 705 (1977).....8, 16, 17

STATE:

Carso v. Board of Liquidation of State Debt, 205 La. 368, 17 So.2d 358 (La. 1944)..... 6

City of New Orleans v. Board of Sup'rs., 216 La. 116, 43 So.2d 237 (1949)..... 5

Falgout v. Dealers Truck Equipment Co., 748 So.2d 399 (La. 1999)..... 4

In The Interest Of The Minor Child, J.M., 590 So.2d 565 (La. 19991)..... 5

Louisiana Public Facilities Authority v. Foster, 795 So.2d 288 (La. 2001)..... 7

Pearce ex rel. Structural Pest Control Com. v. Sharbino, 254 La. 143, 223 So.2d 126 (1969)..... 5

State v. Carter, 95 00703 (La. App. 3rd Cir. 9/12/95), 663 So.2d 152 16

State v. Manuel, 426 So.2d 140 (La. 1983)..... 5

TABLE OF AUTHORITIES – Continued

Page

Theriot v. Midland Risk Ins. Co., 694 So.2d 184 (La. 1997) 5

Thibaut v. Bd. of Comm. of Lafourche Basin Levee Dist., 96 So. 47 (La. 1923) 5

Wall v. Close, 203 La. 345, 14 So.2d 19 (1943) 6

Woodard v. Reily, 244 La. 337, 152 So.2d 41 (La. 1963) 7

CONSTITUTIONAL PROVISIONS:

FEDERAL:

U.S. Constitution Article 3 29

U.S. Const. Amendment 1 ..... 4, 11, 20

U.S. Const. Amendment 10 20

STATE:

La. Const. (1974) art. 3, §16 ..... 5, 6

La. Const. (1921) art. 3, § 22 6

STATUTES:

STATE:

La. C.C. art. 2 4

La. R.S. 32:863.1 16

La. R.S. 47:463.57 4

La. R.S. 47:463.61 ..... *passim*

La. R.S. 47:505 ..... 7, 16

TABLE OF AUTHORITIES – Continued

Page

MISCELLANEOUS:

Wright & Miller, 16 Fed. Prac. & Proc., Juris.2d §3921.1 10

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Defendants, Richard L. Stalder, in his official capacity as Secretary of the Louisiana Department of Public Safety and Corrections, and John Kennedy, in his official capacity as Treasurer of the State of Louisiana, oppose the granting of a writ of certiorari to the United States Court of Appeals for the Fifth Circuit at the request of plaintiffs for a number of reasons which are set forth below.

STATEMENT OF THE CASE

The petitioners' "Statement of the Case" in their petition contains numerous erroneous legal conclusions and a completely erroneous interpretation of the statute in violation of the Supreme Court of Louisiana's rules for interpreting Louisiana state statutes.

Instead of reciting what the petitioners sought by this litigation in terms of legal conclusions, as have petitioners in this case, defendants have reproduced in the Appendix hereto[1] the petitioners' Second Amended Complaint, their final pleading controlling their case. *See* Opp. App., pp. 1-9. This Second Amended Complaint speaks for itself. It was in the appellate record that went before the U.S. Court of Appeals for the Fifth Circuit, and was, therefore, before that court for review on appeal of this case, even though it was filed after the notice of appeal.

[1] The Appendix to this opposition brief will hereinafter be abbreviated "Opp. App." and the Appendix to the writ petition will hereinafter be abbreviated "Pet. App."

It is interesting to note that nowhere in this Second Amended Complaint is it alleged that the State of Louisiana did anything to create any kind of *forum* for private speech. Because the words of the Legislature in a statutory law that it enacts are obviously state governmental speech, the Second Amended Complaint appears to imply that the law is to the effect that *fora* analysis applies to governmental speech – that is, once the state itself uses its own property for publication of governmental speech on a polemical issue, then it must automatically allow private speech makers the opportunity to publish their views by using that same property.

At the hearing on the preliminary injunction, the district court seemed to so read the case. It found that the "Choose Life" message enacted by the Louisiana Legislature was indeed state speech, but apparently because it was speech on a polemical subject, the district court applied *fora* analysis to the situation anyway and said that the state had engaged in viewpoint discrimination by its own speech and in not producing for some of the petitioners new license plates on which to express their differing viewpoints. As a result, the district court enjoined the state speech and the publication of the state's authorized motor vehicle license plates.

Over defendants' arguments against federal jurisdiction, petitioners failed to introduce sufficient evidence at the hearing to show that there was federal jurisdiction in this case or that there is any likelihood of an Establishment Clause violation. The district court only granted the preliminary injunction apparently because it thought that *fora* analysis applied to state governmental speech, despite petitioners' contention that the "Choose Life" message mandated by the legislatively enacted statute was

merely private speech. If, indeed, the "Choose Life" message is actually state governmental speech, not only does *fora* analysis not apply (meaning that the complaint fails to state a claim for which relief can be granted), but also there can be no substantial federal question raised by the Second Amended Complaint. In this case, then, there is no federal court jurisdiction because there is no authentic federal question.

Believing that the gravamen of the errors of the district court in granting the preliminary injunction to be the application of *fora* analysis to state governmental speech and then, as a result, the enjoining of the speech (be it governmental or private) with a prior restraint, the defendants took an immediate appeal to the U.S. Court of Appeals for the Fifth Circuit.

The Court of Appeals sagaciously ruled that there was lack of federal jurisdiction in this case. Having before it in the appellate record a transcript of the hearing on the preliminary injunction, the district court's orders and rulings, and the Second Amended Complaint, it ruled essentially that the petitioners did not show sufficient standing to complain about the Establishment Clause claim as taxpayers and that the claim of free speech violation as alleged by them was not able to be redressed under applicable federal law (defendants understand this ruling to mean in practice that there was no federal question jurisdiction).

ARGUMENT: REASONS FOR DENYING THE WRIT

Petitioners Erroneously Interpret The State Statute.

Act 729 of the 1999 Regular Session of the Louisiana Legislature enacted into law La. R.S. 47:463.57, which was redesignated by the Louisiana Law Institute as La. R.S. 47:463.61 without any change in its internal substance. Thus, La. R.S. 47:463.61 provides for the "Choose Life" special prestige license plate and its ultimate statutory purposes.

The petitioners fail to present to this Honorable Court the proper interpretation of the statute in accordance with the rules for interpreting state statutes by the state's highest court. Properly interpreted, the statute does not violate any provision of the First Amendment or any part of the U.S. Constitution.

Louisiana is a mixed jurisdiction having a substantial French and Spanish civilian heritage, unlike the other states with an English common law heritage. Of course, under the general rules of any statutory construction, courts begin their review with the premise that legislation is the solemn expression of legislative will; therefore, the interpretation of the law involves, primarily, the search for the legislature's intent. In civilian heritage and in Louisiana, the legislative will *is* the law, not case law, which is merely interpretative. La. Civil Code art. 2. *See* also generally *Falgout v. Dealers Truck Equipment Co.,* 748 So.2d 399 (La. 1999). When the act is reasonably capable of having more than one meaning and is constitutionally valid with one meaning and not valid with another, the constitutionally valid meaning will be adopted to save the statute, if possible, because the Legislature is presumed to

have intended to enact a constitutionally valid law. *State v. Manuel*, 426 So.2d 140 (La. 1983) and *Pearce ex rel. Structural Pest Control Com. v. Sharbino*, 254 La. 143, 223 So.2d 126 (1969).

Peculiarities in civilian jurisdictions occur when it comes to interpreting statutes with relation to other state statutes and state constitutional provisions. They must interact in the same manner as though the Legislature enacted one harmonious civil code, if possible.

> "[I]n interpreting a part or section of an act, in dispute, the part or section should be interpreted in connection with the rest of the act, and in connection with all laws on the same subject-matter. Moreover, the object that the Legislature had in view should be ascertained, and the interpretation adopted which best harmonizes with the context and with that object."

Thibaut v. Bd. of Comm. of Lafourche Basin Levee Dist., 96 So. 47, 48 (La. 1923). "Laws are presumed to be passed with deliberation and with full knowledge of all existing ones on the same subject. *City of New Orleans v. Board of Sup'rs.*, 216 La. 116, 43 So.2d 237 (1949)," *Theriot v. Midland Risk Ins. Co.*, 694 So.2d 184, 186 (La. 1997). All applicable laws on the same subject matter should be construed together so as to produce a harmonious system, if possible. *Id.* In *In The Interest Of The Minor Child, J.M.*, 590 So.2d 565 (La. 1991), the Supreme Court of Louisiana actually read constitutional requirements of notice and opportunity to be heard into statutes that did not explicitly contain them, in order to produce that one harmonious system.

Regarding the context of state fiscal operations into which R.S. 47:463.61 must operate, La. Const. (1974) art.

3, §16(A) states, "Except as otherwise provided by this constitution, *no money shall be withdrawn from the state treasury except through specific appropriation*, and no appropriation shall be made under the heading of *contingencies* or for longer than one year." (Emphasis added.) Opp. App., p. 10. La. Const. (1974) art. 3, §16(C) reads, "The general appropriation bill shall be *itemized* and shall contain only appropriations for the ordinary operating expenses of government, *public charities*, pensions, and the public debt or interest thereon." (Emphasis added.) Opp. App., p. 10. And La. Const. (1974) art. 3, §16(D) mandates, "All other bills for appropriating money shall be for a *specific purpose and amount*." (Emphasis added.) Opp. App., p. 10.

Thus, despite the wording of the mere face of the statute at issue here, it must be understood that there is no person or body that decides what organizations get what amount of "Choose Life" Fund monies other than the Louisiana Legislature. The state treasurer is a ministerial officer who will implement the Legislature's choices in the matter. And the terms of the statute do not absolutely bind the Legislature in this process, but in a directorial manner, by these words the Legislature reminds itself of its duty to adhere to the purposes of the statute when doing so. As the Supreme Court of Louisiana has explained,

> "The Legislature has absolute control over the finances of the State except as limited by constitutional provisions. *Wall v. Close*, 203 La. 345, 14 So.2d 19; Art. III, Sec. 22, La.Const. of 1921, *supra*. 'That the appropriating of the State's funds is a legislative function is fundamental. It is so recognized in the jurisprudence of all of the States and by all of the law writers on the subject.' *Carso v. Board of Liquidation of State Debt*, 205 La. 368, 17 So.2d 358, 363."

Woodard v. Reily, 244 La. 337, 152 So.2d 41, 56 (La. 1963). *See* also *Louisiana Public Facilities Authority v. Foster*, 795 So.2d 288, 301 (La. 2001). Thus, the state treasurer and advisory council do *not* determine what organizations receive what amounts of "Choose Life" Fund monies; the Louisiana Legislature does in the appropriations process.

Consequently, the essence of this statute, which must be read *in pari materia* with other statutes designating the powers and duties of state governmental branches, departments, officers, and employees in order to result in one harmonious system, is that the secretary of the Department of Public Safety and Corrections provides for the special prestige motor vehicle license plate established by this statute containing the legislatively mandated "Choose Life" message, and although the "Choose Life" Advisory Council may draw up an initial design to go with the statutorily designated "Choose Life" message, the secretary also makes the final determination whether to accept the recommended design or use another that is in compliance with the law generally governing motor vehicle license plate design.[2] In this manner, the State of Louisiana engages in its own speech of providing the State's own message encouraging the choice of life over death and abortion, in accordance with the State's own legitimate interest in the life of an unborn child from the outset of pregnancy to birth. However, so as not to require everyone with a registered motor vehicle to display this particular

[2] *See* La. R.S. 47:505, particularly subsections A and E thereof. Opp. App., p. 11-12.

"Choose Life" license plate,[3] the license plate with this message is offered as an alternative plate to the basic plate for persons who wish voluntarily to pay an additional fee and display this State message.

The statute also provides for the State to obtain revenue from the issuance of these "Choose Life" license plates for the purpose of using its own resources to encourage pregnant women to choose life and adoption over abortion by financing crisis-pregnancy assistance in such forms as crisis-pregnancy counseling, obstetric and pediatric medical and health care, pregnancy care, new-born care and assistance, and adoption services, if finally desired by the pregnant woman.

The funds, once collected from the sale of the plates, are to be appropriated by the state legislature directly from the state treasury to organizations which actually provide such "material" – *i.e.*, "secular" – services; these service-providers must be organizations which have qualified for federal income tax exemption pursuant to Section 501(c)(3) of the Internal Revenue Code[4] and must, therefore, be eleemosynary in nature and act as a "charitable trust," *Bob Jones University v. U.S.*, 461 U.S. 574, 591, 585-592 (1983), to provide these material services ultimately for the public benefit. No one but the Louisiana Legislature, in its act appropriating the funds for expenditure from the state treasury, makes the final determination as to which, if any, of these service-providing organizations will receive what amounts of funds for the

---

[3] *Cf. Wooley v. Maynard*, 430 U.S. 705 (1977).

[4] La. R.S. 47:463.61(F)(2). Pet. App., p. A-58.

specific purposes quoted above as explicitly spelled out in the statute. La. R.S. 47:463.61(G) provides authorization to require annual audits to ensure that these funds are being properly spent for these (secular) purposes. Pet. App., p. A-59.

The provision disallowing monies to go to organizations which engage in abortion referrals and abortion counseling is meant to restrict these funds from subverting the very purposes for which they exist and are appropriated by the Louisiana Legislature. They may not be spent to support – directly or indirectly – abortions, abortion referrals, or abortion counseling but rather to support alternatives to abortion encouraging childbirth and life. *See Maher v. Roe*, 432 U.S. 464 (1977); *Harris v. McRae*, 448 U.S. 297 (1980); *Poelker v. Doe*, 432 U.S. 519 (1977); and *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989). With these provisions, Louisiana

> "is not denying a benefit to anyone, but is instead simply insisting that public funds be spent for the purposes for which they were authorized. * * * Thus, a charitable organization could create . . . an affiliate to conduct its [non-abortion] activities using [these funds], and at the same time establish . . . a *separate affiliate* to pursue its [abortion] efforts without [these funds]."

Rust v. Sullivan, 500 U.S. 173, 196-198 (1991) (emphasis added).

Petitioners' Question Number 1

The petitioners' question number one does not present a conflict among the circuits because the Second Amended Complaint (Opp. App., pp. 1-9) was in the appellate record

and before the Court of Appeals when ruling on the question of federal jurisdiction, and since appellate courts have the discretion to consider the entire appellate record when considering federal jurisdiction, a discretionary policy of this Court of Appeals circuit to do so in this case, while a discretionary policy of another circuit not to do so in another case, does not constitute a conflict among the circuits to be resolved by one mandatory rule for all cases by this Honorable Court.

As stated by Wright & Miller,

> "This is an equity case, and it is well established that in such a case, although a reviewing court will usually decide only those issues which are necessary to dispose of an appeal, an interlocutory appeal brings the entire case before the court."

16 Fed. Prac. & Proc., Juris.2d §3921.1.

Accordingly, the rule as to the scope of review of an interlocutory appeal is as follows:

> "[T]he scope of review may extend further to allow disposition of all matters appropriately raised by the record, perhaps leading to final disposition of the case. Jurisdiction of the interlocutory appeal is in large measure jurisdiction to deal with all aspects of the case that have been sufficiently illuminated to enable decision by the court of appeals without further trial court development. Any other rule frequently would require wasted litigation without any offsetting advantage in economy of appellate effort or uninterrupted trial court proceedings."

Id. (citing cases in notes 6 and 7). Further,

> "As with appeals from rulings with respect to interlocutory injunctions, the scope of the appeal should be determined as a matter of *appellate discretion*. Review is proper as to issues that are clearly illuminated by the record, that can be decided without interfering with continuing trial court proceedings, and that fall within a convenient and efficient appellate package."

Id. (Emphasis added.) "Many of the cases of expanded review, moreover, involve questions that generally remain open throughout the course of the litigation, such as subject-matter jurisdiction. . . . " *Id.* Such is the case here.

The plaintiffs' Second Amended Complaint (Opp. App., pp. 1-9) is in the appellate record at pages 1-8. Thus, contrary to the contention of plaintiffs' petition for writ, all of the plaintiffs' claims – including the Establishment Clause claims and the organizational claim of viewpoint discrimination in the grantmaking process – were before the Court of Appeals for jurisdictional inquiry.

Petitioners' Question Number 2

The second question presumes the resolution of the real issue in this case in the question and is improper. The issue is not whether the remedy of barring the state from the *forum* for private speech is available; it is whether there exists a *forum* for private speech at all (or simply governmental speech to which *fora* analysis does not apply). If the answer is that the "Choose Life" message published on the license plate is governmental speech, there is no *fora* analysis at all and no substantial federal question raised by the petition, since it is already established by the First Amendment and other law and jurisprudence that *fora* analysis does not apply to

governmental speech. In such a case, the speech cannot be enjoined, and there exists no federal law or jurisprudence entitling petitioners to force the State of Louisiana to produce license plates for their private speech. Accordingly, the Second Amended Complaint not only fails to state a claim upon which relief can be granted but also fails to raise a substantial federal question in this regard. Thus, there is no federal question jurisdiction here.

Most governments, both federal and state, own property interests, including immovable or real property, movable or personal property, resources, and monies. Public streets, alleys, parks, and public ways have traditionally been considered throughout American history to be places where people can gather and express themselves. Other than those kinds of places, no one has a right to use government property to publish or express his own private viewpoints, but he must do so using his own resources. However, government can deliberately turn over this latter property, either permanently or temporarily, to private persons to engage in their own private speech with the motive to encourage private expression of varying viewpoints and public discourse on any number of issues. Thus, in a recent case, this Honorable Court has succinctly condensed the *fora* analysis as follows:

> "Traditional public fora are defined by the objective characteristics of the property, such as whether, 'by long tradition or by government fiat,' the property has been 'devoted to assembly and debate.' . . . The government can exclude a speaker from a traditional public forum 'only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest.' . . .

> "Designated public fora, in contrast, are created by purposeful governmental action. 'The government does not create a [designated] public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional public forum for public discourse.' . . . [A] designated public forum is 'property that the State has opened for expressive activity by part or all of the public'. . . . Hence 'the Court has looked to the policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum.' . . . If the government excludes a speaker who falls within the class to which a designated public forum is made generally available, its action is subject to strict scrutiny. . . .
>
> "Other government properties are either nonpublic fora or not fora at all. . . . The government can restrict access to a nonpublic forum 'as long as the restrictions are reasonable and [are] not an effort to suppress expression merely because public officials oppose the speaker's view.' . . ."

Arkansas Educational Television Commission v. Forbes, 523 U.S. 666, 677-678 (1998) (citations omitted). When the government property is "not fora at all," *id.*, content neutrality is not required because the government can shape and proclaim its own message without censorship, variations, or other contrary or confusing messages interjected by private persons. *Rust*, *supra*. The majority opinion in *Rosenberger v. Rectors and Visitors of the University of Virginia, et al.*, 515 U.S. 819 (1995) was careful to explain:

> "The quoted language in *Widmar* was but a proper recognition of the principle that when the State is the speaker, it may make content-based choices. When the University determines the content of the education it provides, it is the University speaking, and we have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message. In the same vein, in *Rust v. Sullivan*, supra, we upheld the government's prohibition on abortion-related advice applicable to recipients of federal funds for family planning counseling. *There, the government did not create a program to encourage private speech but instead used private speakers to transmit specific information pertaining to its own program. We recognized that when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes.*" (Emphasis supplied)

Id., 515 U.S. at 833. And the Eighth Circuit had recent occasion to explain,

> "The Supreme Court has recently distinguished, in dicta, between speech on government property and speech by the government. In *Rosenberger*, 515 U.S. at 833, 115 S.Ct. 2510, the Court noted that 'when the State is the speaker, it may make content-based choices.' Specifically, the Court has 'permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message.' *Id. Moreover, whereas forum analysis and viewpoint neutrality may be required when the government 'expends funds to encourage a diversity of views from private speakers,' the government's 'own speech . . . is*

> *controlled by different principles.' Id.* at 834, 115 S.Ct. 2510."

Knights of the Ku Klux Klan, et al. v. Curators of the University of Missouri, et al., 203 F.3d 1085, 1094 n.11 (U.S. App. 8th Cir. 2000) (emphasis supplied). Hence, *fora* analysis does not apply at all when the government uses its own property to engage in its own governmental speech. And this includes the editorial content of the governmental publication incorporating the private speech of private speakers; there, the government is not opening its property to private speakers in order for them to speak their own minds but itself is selecting the particular viewpoints of certain private speakers to be relayed in a governmental message, as when a public educational television channel chooses its broadcasting line-up or when the Environmental Protection Agency (EPA) chooses to publish the views and opinions of certain scientists for its own purposes, such as to support an EPA project. *See Forbes, supra*.

Accordingly, the real issue in this case is whether the State of Louisiana is engaging in its own governmental speech when it publishes the legislatively mandated statutory language and message, "Choose Life," on its own motor vehicle license plates offered for sale to the public as an alternative to the basic plate. If it is, it is not a *forum* of any kind opened to all, or part of, the private members of the public to publish their own counter-messages on other official state motor vehicle license plates, and *fora* analysis does not apply. And the petitioners are not entitled by federal constitution, law, or jurisprudence to force the state to produce special license plates simply for their private speech. As a consequence, the Second Amended Complaint does not raise a federal question at all with

respect to Free Speech or other federal law, and federal question jurisdiction is lacking.

Motor vehicle license plates were never historically any kind of forum whatsoever for private expression. They have historically served strictly public purposes – *e.g.*, to identify which vehicles actually using the public highways, roads, ways, and streets have paid the vehicle registration tax and, for law enforcement purposes, to identify vehicles which may have been involved in the violation of criminal and/or traffic laws, and, in fulfillment of these purposes, to bear and display the exact same unique number as the registration number assigned by the state to the motor vehicle and record owner thereof. *See*, e.g. *State v. Carter*, 95 00703 (La. App. 3rd Cir. 9/12/95), 663 So.2d 152. Motor vehicle registration license plates remain the property of the state and are removable and returnable to the state; upon violations, the state may summarily repossess them. *See*, e.g. La. R.S. 47:505(B), and La. R.S. 32:863.1(C)(1)(a) and (b).

However, there is just enough space on a motor vehicle license plate to publish a brief motto or slogan and perhaps a logo or small image. Usually, the state will place on its basic motor vehicle license plate the state's motto, or a slogan associated with or praising the state in some way, and/or a small image associated with the state. Such motto, slogan, and/or image chosen by the state to be put on its license plates is state governmental speech. *See Wooley v. Maynard*, 430 U.S. 705 (1977) (implicitly recognizing that the motto on an official state motor vehicle license plate is the state's own speech and holding that it

cannot, therefore, be involuntarily forced upon a private person to display on his private vehicle).[5]

However, states began allowing the private members of the public to choose their own vehicle registration number-letter combinations, subject to the restrictions that it be unique, fulfill the identification and law enforcement purposes of license plates, and be suitable for viewing by the general public, including children. But otherwise this license plate is like the regular official basic state motor vehicle license plate. Louisiana allows such a license plate; it is called a "vanity" plate in Louisiana and is a nonpublic forum. It was this kind of license plate that was at issue, for example, in *Pruitt v. Wilder*, 840 F.Supp. 414 (USDC, Va. E.D. 1994) and *Lewis v. Wilson*, 89 F.Supp.2d 1082 (USDC, Mo. E.D. 2000). But this kind of license plate is not involved in this case at all.

Some states provide for the private design of special license plates by private members of the public who are also members of civic, religious, patriotic, historical, genealogical, religious, and educational organizations and who can concur among themselves on their own license plate design for their respective organizations within certain minimum numbers who will agree to purchase same, sometimes for an extra fee, all within the overall motor vehicle license specifications as to vehicle identification and law enforcement purposes for which license plates

---

[5] Like the *Rust* case discussed in *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 541-542 (2001), the court in *Wooley* did not explicitly rely on the doctrine of "governmental speech," but the only way to explain the holding in this case is on such an understanding.

exist. These designs may bear their respective organization's name, motto, or slogan and a small logo or image associated with the organization, but the choice of whether to have such a license plate and what these mottos, slogans, logos, and images will be is left to these private persons. This kind of license plate was at issue in *Sons of Confederate Veterans, Inc. v. Glendening*, 954 F.Supp. 1099 (USDC, Md., 1997). Louisiana has never employed this kind of license plate or statutory scheme.

Louisiana does have, in addition to its regular basic license plate and its "vanity" plate, special prestige license plates. However, the Louisiana Legislature specifies each kind of special prestige license plate; without explicit legislative, statutory stipulation that a special prestige license plate may exist, it does not exist. The special prestige motor vehicle license plate is a another way for the Louisiana Legislature to give recognition, commendation, and honor to certain organizations and groups and to establish specific programs, such as the "Choose Life" motor vehicle license plate program. It is the same as the Louisiana Legislature adopting resolutions, for example, to recognize, commend, and honor certain organizations and groups, such as in the following resolutions from its 2001 Regular Session: Senate Concurrent Resolution (SCR) 20 (urging college students to participate in the Big Brothers-Big Sisters of America); House Resolution (HR) 38 (cancer awareness program); HR 21 and Senate Resolution (SR) 21 (recognizing, commending, and urging

support for the Girl Scouts' Read-to-Lead project).[6] These, like the messages conveyed on Louisiana's basic and special prestige license plates, are examples of quintessential state governmental speech. It is the Louisiana Legislature speaking; it is the Louisiana Legislature expressing its recognition, commendation, and honor for private groups and organizations which have benefitted the public good. In the case of the "Choose Life" special prestige license plate, it is the Louisiana Legislature expressing its own message of encouraging the choice of life and childbirth over abortion and providing a means to fund goods and services for women in crisis pregnancies to further encourage childbirth and adoption as alternatives to abortion.[7]

---

[6] These resolutions, and others like them, can be found by using the search features on the Louisiana Legislature's official website on the Internet, "http://www.legis.state.la.us/"

[7] Virginia, in the case of *Sons of Confederate Veterans, Inc. v. Comm'r of Va. DMV*, 288 F.3d 610 (U.S. App. 4th Cir. 2002) *writ petition pending*, seems to have a license plate program between that of Louisiana and that of Maryland in *Glendening*, *supra*, in that only license plates established by law (legislative act) can exist, but the Commissioner of the Va. Dept. of Motor Vehicles, by administrative action, allowed each organization for which there was a license plate to select its own logo or image to appear on the plate. Such administration action would seem to create a nonpublic forum only for the choice of the logo or image to be published on the license plate. But then the Virginia Legislature enacted a law taking that choice away from only one organization while leaving it in place for all the other organizations (raising an Equal Protection issue). Bound up in the questions of that case is the state law question of the subjugation of administrative officers and actions to legislative enactments. The Fourth Circuit, however, made the case more complex by using a four-prong test not approved by this Honorable Court, not to clarify, simplify, or enlighten the identification of governmental speech, but unnecessarily to obfuscate it. It should be obvious that a legislative enactment is itself state

(Continued on following page)

The state, acting through its people's elected representatives in the Louisiana Legislature and its democratic processes, has the right to speak this message. *See* U.S. Const. Amend. 10 (Opp. App., p. 10) and Amend. 1 (Pet. App., p. 1).[8]

> "[T]he State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child.
>
> * * *
>
> "Even in the earliest stages of pregnancy, the State may enact rules and regulations designed to encourage [a pregnant woman] to know that there are philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy to full term and that there are procedures and institutions to allow adoption of unwanted children as well as a certain degree of state assistance if the mother chooses to raise the child herself. '*[T]he Constitution does not forbid a State or city, pursuant to democratic processes, from expressing a preference for normal childbirth.*'"

---

speech and so is any message which is directed by a legislatively enacted statute to be published on an official state motor vehicle license plate.

[8] It is submitted that state speech is protected by the First Amendment (Pet. App., p. 1), because the Tenth Amendment (Opp. App., p. 10) secures to the state the right to make the speech and the First Amendment is, first and foremost, a limitation upon the power of the federal government. It forbids the federal government, including federal courts, from sensoring or prohibiting such speech.

Casey v. Planned Parenthood of SE Penn., 505 U.S. 833, 846, 872-873, 877-878 (1992) (emphasis added). Accord, *Poelker v. Doe*, 432 U.S. 519 (1977) and *Maher v. Roe*, 432 U.S. 464 (1977) (states may choose to use their public funds to provide financial assistance for childbirth and not abortion and, being implicitly necessary, to disseminate knowledge thereof); *Rust v. Sullivan*, 500 U.S. 173 (1991) (government's own message may favor childbirth and exclude abortion without viewpoint-discrimination infringement on private speech rights); *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989) (state may prohibit use of its public resources for abortion-related activities and encouragement thereof).

In issuing the preliminary injunction, the district court reasoned,

> "Defendants write:
>
> > "'Louisiana, through its democratic process of legislative enactments, makes a varied number of official statutory messages by the state itself available to those who choose an alternative state message instead of the one on the basic license plate and to pay an additional fee for the same. Without statutory authorization for the plate, it cannot be issued; Louisiana has not made its special design motor vehicle license plates a forum for private speech, slogans, mottos and symbols.'
>
> (Defendants' Memorandum in Opposition at 9). This contention is an oxymoron. The state is using public property to 'speak' to promote its view and to allow members of the motoring public also

> to 'speak' that same message and then contending it has not created a forum for speech."

Henderson v. Stalder, 112 F.Supp.2d 589, 595 (USDC, La. E.D. 2001), Pet. App., p. A-37. Furthermore,

> "Indeed, the defendants maintain that they are articulating a viewpoint legislatively chosen and embraced by the State. Obviously then the intent of the defendants is to convey a particularized message of the 'state's' choosing to promote a 'pro-life' agenda through the motor-vehicle driving public who select a 'Choose Life' plate."

Id., at 596 (Pet. App., p. A-38). The district court actually and erroneously held that the state's engaging in its own governmental speech on its own property *ipso facto* created a forum for private speech on that property and applied *fora* analysis to governmental speech.

> "[O]nce the State creates a forum where viewpoints are expressed, it must be viewpoint neutral. The State has unequivocally taken the stand here that the message 'Choose Life' is its own message and that the democratic process, *i.e.* 'the legislative act', will be frustrated if the Act is declared unconstitutional. The State has chosen license plates as a forum for speech. Once it makes this choice it cannot discriminate against another viewpoint."

Id., at 598 (Pet. App., p. A-42).

Of course, if the district court's holding was allowed to stand, chaos would result for all governments. For example, the federal government printing office (GPO)

publishes and offers for sale books and posters encouraging certain policies of the EPA and posters depicting military personnel, weapons, warplanes, and ships.[9] Private persons who concur in these messages and images buy these posters and display them on their private property (bulletin boards, walls, bedrooms, offices, etc.) to further disseminate the messages inherent in them to other private persons who will see them. But there are other private persons who vehemently disagree with these books and posters. One group sells various books and a poster that reads, "The earth is fine, save yourself!"[10] Still other private persons are opposed to anything military and are appalled that the federal government would publish and offer for sale posters glorifying military persons and weapons systems. Under the district court's ruling in this case, the GPO has made the GPO posters, books, and other offerings a *forum* for private speech, and private persons who disagree with the GPO posters would be entitled to require the federal government and GPO to publish and offer for sale their posters encouraging their opposing viewpoints as well. The error of the district court is in its failure to recognize that *fora* analysis does not apply to governmental speech, which it found that the "Choose Life" message was.

---

[9] *See*, for example, on the Internet "http://bookstore.gpo.gov/sb/sb-088.html" and "http://bookstore.gpo.gov/sb/sb-098.html"

[10] *See* "http://www.junkscience.com/store.htm" on the Internet.

Petitioners' Question Number 3

The third question also presumes the answer to the real question in this case and is improper. The real question is whether the petitioners' taxpayer monies must necessarily be spent on the "Choose Life" license plates and program. They did not allege in their complaint how their tax money would necessarily be spent on the program and failed to present any evidence at the hearing on the preliminary injunction that such is the case. Moreover, petitioners omit that, besides the "three dollar and fifty cent handling fee to be retained by the department to offset a portion of administrative costs," La. R.S. 47:463.61(C), Pet. App., p. A-56, the purchaser of the "Choose Life" license plate pays not only the twenty-five dollars that goes into the "Choose Life" fund but also pays "the regular motor vehicle license fee provided in R.S. 47:463," *id.*, which, together with the three dollars and fifty cents, is more than the costs of the license plate and program. The license plates and the program are completely sustainable by the voluntary purchases of the license plate.[11]

The panel was correct in finding the Establishment Clause claim to be too "conjectural or hypothetical,"

---

[11] Petitioners are in total error when they suggest that because the monies go first to Bond Security and Redemption Fund, their expenditure on the "Choose Life" activities will reduce state funds available for other purposes. The funds may be used, if needed, to secure the obligations of the state on bonds in any fiscal year, but if they are not needed (which is usually the case), they can be appropriated only for the special statutory purposes for which they exist. Thus, this deposit has no effect on other state funds, except to supplement them to pay bonds in any given fiscal year, only if needed.

Henderson v. Stalder, 287 F.3d 374, 380 (U.S. App. 5th Cir. 2002), Pet. App., p. A-7, for the kind of concrete and particularized, actual or imminent injury needed for proper standing. Moreover, it was correct in holding that the petitioners failed to show that tax revenues will be spent to promote religion. In doing so, it applied the correct test:

> "Unlike the general test for taxpayer standing, which requires 'direct injury' to the taxpayer, *See ASARCO, supra,* the Supreme Court's test in Establishment Clause cases requires only income taxpayer status and the showing of a direct expenditure of income tax revenues on the allegedly unconstitutional program. *Flast v. Cohen,* 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1962)."

Id., at 381 n.7 (Pet. App., p. A-9).

If Planned Parenthood wished to receive funds under this statute, it could do so by establishing a separate affiliate which did not engage in the prohibited abortion activities and could not spend these funds on such activities. *Rust*, *supra*, at 196-198. Its application would be considered for merely advisory recommendation by the advisory council and considered for funding by the Legislature; however, actual appropriations and funding might depend on a myriad of factors, including the efficiency of the organization to deliver services, if funded, and the need of the organization for resources.

The petitioners misread the "secular purpose" of the statute and the secular role of the advisory council in light of that purpose and misread too many governmental powers into the "Choose Life" Advisory Council, which is a body of unpaid citizens who, acting in a merely advisory

capacity, only make recommendations to those with true governmental powers. The Secretary of the Department of Public Safety and Corrections, not the advisory council, is the governmental official who is finally responsible for the establishment and design of the license plate,[12] and in the appropriations process, it is the Louisiana Legislature, not the advisory council, which determines what organizations receive what amounts of these funds. In this regard, the Louisiana Legislature would like to have the merely advisory recommendation of the advisory council, but any one may render his or her own different recommendation to the Legislature in the appropriations process.

Accordingly, this case only involves the secular input of individuals from organizations which seek to establish secular policies which are merely consistent with basic religious values, not to promote any sectarian creed within government. Because of their activities in the secular world in their promotion of childbirth and adoption as alternatives to abortion, they coincidentally have vast personal knowledge of and experience with current organizations and associations which render secular services to women in crisis pregnancies and the effectiveness and efficiency of these organizations and associations in rendering these services. Thus, their secular input is this personal knowledge and experience. Hence, in this facial

[12] Eventually, a design was selected by the Secretary, and it is not religious but secular. The symbol chosen was a pelican (the state bird and symbol for the State of Louisiana) holding in its bill a blanket in which a baby is wrapped. The design of the license plate was introduced into evidence at the hearing on the preliminary injunction and is in the appellate record.

challenge to the statute, the statute can and will operate validly.

The Court of Appeals put it this way:

> "We find the Establishment Clause challenge by Loewy, LaMothe, and the NCJW is predicated on an injury based in conjecture and, therefore, insufficient for federal standing purposes. The argument advanced by these plaintiffs is that because the Choose Life Council is to be comprised of individuals who belong to organizations that allegedly espouse Christian ideologies, the actions taken by the Council, presumably with regard to the manner in which the Choose Life Fund is distributed, will either advance Christianity or will otherwise interfere with their own religious beliefs or principles. There is, however, no allegation that the mandatory members of the Council have yet distributed any money from the Choose Life Fund or that in so doing, or contemplating distributions, they have actually advanced the religious ideologies of their respective organizations or religion in general. At best, the focus of the alleged injury complained of by these plaintiffs arises because of an appearance of future impropriety, which we have found insufficient to confer standing. [Citing case.] Accordingly, we find that plaintiffs Loewy, LaMothe and NCJW, in alleging injury based on the manner in which the Choose Life statute would be administered, have failed to allege 'an injury in fact' and, therefore, lack standing to challenge the facial constitutionality of that statute."

Henderson v. Stalder, *supra*, at 380 (Pet. App., p. A-8). In addition,

> "The state taxpayer plaintiffs allege that they will be injured by the use of their income tax dollars to administer the provisions of the Choose Life statute. We have held that to establish taxpayer standing to challenge the constitutionality of a state statute on the basis of the Establishment Clause, a party must show that 'tax revenues are expended on the disputed practice.' [Citing case.] The terms of the Choose Life statute contradict the plaintiffs' allegation that state income tax dollars would be used for the administration of either the Choose Life Council or the Choose Life Fund. Under the statute, members of the Council serve on a voluntary basis and are not provided 'compensation or reimbursement of any type.' La.Rev.Stat. § 47:463.61(E)(1). Additionally, the statute requires the payment of an additional $3.50 fee, in addition to the regular motor vehicle license fees, to offset a portion of the associated administrative costs. *Id.* at § 47:463.61(C). Under these facts, we find that the complained of injury of the state taxpayer plaintiffs, *i.e.*, use of their income tax dollars to administer the Choose Life statute, is insupportable and, therefore, insufficient to confer standing to challenge the constitutionality of that statute."

Id., at 380-381 (Pet. App., p. A-8, 9).[13] "[T]he psychological consequence presumably produced by observation of

---

[13] It must be remembered that the Court of Appeals found that "the plaintiffs' skeletal allegations – *e.g.*, that they are state income taxpayers; that Keeler wants to purchase a license plate expressing pro-choice views; and that Loewy's and LaMothe's "religious beliefs are harmed by the statute" – do not require further development in order to assess

(Continued on following page)

conduct with which one disagrees," *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 485 (1982), "is not an injury sufficient to confer standing under Art. III, even though the disagreement is phrased in constitutional terms," *id.* at 485-486.

CONCLUSION

The Court of Appeals properly dismissed this facial challenge to the statute. The statute is capable of constitutional construction. Since most of the alleged injuries do not exist but are only alleged to occur in the future, they are conjectural and speculative. Thus, petitioners cannot show any actual injury to themselves to sustain standing and jurisdiction. Nothing prevents petitioners from bringing an "as applied" challenge later if any real violation to them does occur. The "Choose Life" message chosen by the Louisiana Legislature and mandated by legislative enactment to appear on the license plate is clearly and

---

their standing to challenge the statute," *Henderson*, *supra*, at 379 n.5, Pet. App., p. A-5.

obviously state speech, to which *fora* analysis does not apply. The petition for writ in this case should be denied.

Respectfully submitted,

RICHARD P. IEYOUB
Attorney General
of Louisiana

THOMAS S. HALLIGAN
Assistant Attorney
General (La.)

ROY A. MONGRUE, JR.
Assistant Attorney
General (La.)
(*Counsel of Record*)

LOUISIANA DEPARTMENT OF
JUSTICE
Civil Division
P. O. Box 94005
Baton Rouge, LA 70804-9005
Telephone: (225) 342-7013

Counsel for Respondents

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

RUSSELL J. HENDERSON, DOREEN KEELER, ROBERT H. LOEWY, GREATER NEW ORLEANS SECTION OF THE NATIONAL COUNCIL OF JEWISH WOMEN, PLANNED PARENTHOOD OF LOUISIANA, EUGENE LAMOTHE Plaintiffs, vs. RICHARD L. STALDER, Secretary, Department of Public Safety and Corrections and JOHN KENNEDY, State Treasurer, Defendants.	X	Civil No. 00-2237, Section "K"

SECOND AMENDED COMPLAINT

Plaintiffs, by and through their undersigned attorneys, bring this complaint against the above-named defendants, their employees, agents, and successors in office, and in support thereof allege the following:

I. JURISDICTION AND VENUE

1. Jurisdiction is conferred on this Court by 28 U.S.C. §§ 1331, 1343(a)(3), and 1343(a)(4).

2. Plaintiffs' claim for declaratory and injunctive relief is authorized by 28 U.S.C. §§ 2201 and 2202; by Rules 57 and 65 of the Federal Rules of Civil Procedure, and by the general legal and equitable powers of this Court.

3. Venue is appropriate under 28 U.S.C. § 1391(b).

II. PARTIES

A. Plaintiffs

4. Plaintiff Russell J. Henderson is a resident of Orleans Parish. He pays state income taxes and objects to his tax money being used for the administration of the Act.

5. Plaintiff Doreen Keeler is a resident of Orleans Parish. She pays state income taxes and objects to her tax money being used for the administration of the Act. In addition, she owns a 1996 passenger car and would like to purchase a prestige license plate expressing her pro-choice views but is unable to do so.

6. Plaintiff Robert H. Loewy is a Rabbi in the Reform branch of Judaism and is a resident of Jefferson Parish. He pays state income taxes and objects to his tax money being used for the administration of the Act. His religious beliefs are harmed by the Act's endorsement and advancement of fundamentalist Christian organizations.

7. Plaintiff Greater New Orleans Section of the National Council of Jewish Women ("NCJW") is a non-profit organization established under section 501(c)(3) of the Internal Revenue Code. The Act offends and harms NCJW's principles and beliefs by endorsing and advancing Christian fundamentalism.

8. Plaintiff Planned Parenthood of Louisiana ("Planned Parenthood") is a non-profit organization established under section 501(c)(3) of the Internal Revenue Code. Planned Parenthood provides reproductive health care, including contraceptives, abortion counseling, referrals to abortion providers, and also engages in pro-choice advertising. Planned Parenthood provides non-directive options counseling for pregnant women,

including the options of carrying to term, adoption, and abortion. Planned Parenthood sues on its on [sic] behalf only as to the second and third claims for relief.

9. Plaintiff Eugene LaMothe is a Reverend at the First Unitarian Universalist Church of New Orleans and is a resident of Orleans Parish. He pays state income taxes and objects to his tax money being used for the administration of the Act. His religious beliefs are harmed by the Act's endorsement and advancement of fundamentalist Christian organizations.

B. Defendants

10. Defendant Richard L. Stalder is the Secretary of the Department of Public Safety and Corrections. He is responsible for administering the Act and for collecting revenue obtained under the Act. Defendant Stalder is sued in his official capacity for his actions, taken under color of state law.

11. Defendant John Kennedy is the state Treasurer. He is responsible for receiving the money that is raised by the Act and for maintaining a special fund, established by to [sic] the Act, as well as for disbursing grants under the Act. Defendant Kennedy is sued in his official capacity for his actions, taken under color of state law.

III. THE CHALLENGED STATUTE

12. House Bill 2082 (codified at La. R.S. § 47:463.61 (1999) [hereinafter "the Act"]), a copy of which is attached hereto as Exhibit A, provides that special "prestige" license plates bearing the legend "Choose Life" shall be established by the Department of Public Safety and Corrections

provided there are a minimum of one hundred applicants for such plate. Upon information and belief, more than one hundred persons have indicated interest in obtaining such license plates.

13. The annual fee for such a plate is $25. That fee is to be collected by the Department of Public Safety and Corrections and forwarded to the state treasurer for immediate deposit in the state treasury.

14. In addition to the $25 annual fee for the license plate, an additional $3.50 handling fee is to be retained by the Department of Public Safety and Corrections to offset a portion of administrative costs.

15. A Choose Life Advisory Council (hereinafter "Council") is established by the Act to design the license plates and to design and review grant applications for qualifying non-profit organizations who would like to receive grants from the proceeds from the prestige license plate fees.

16. Members of the Council serve for one-year terms, on a voluntary basis. They receive no compensation. The Act requires that the Council be comprised of the following three members: president of the American Family Association or that person's designee; president of the Louisiana Family Forum or that person's designee; president of the Concerned Women for America or that person's designee.

17. The statute empowers these three members of the Council to appoint, in their discretion, additional members to the Council from the following categories of individuals: physicians who specialize in obstetric or pediatrics; women who have surrendered children for adoption; couples who have adopted children; adoption

advocacy groups; and certified social workers or counselors.

18. An amount equal to the monies received by the state treasury from the "Choose Life" license plates will be deposited into the Choose Life Fund (hereinafter "Fund"). The Council will determine which non-profit organizations are eligible to receive the funds as required by the Act. An organization must demonstrate it provides counseling and other services to meet the needs of expectant mothers; however, no money shall be distributed to organizations that counsel women to consider abortion, provide referrals to abortion clinics, provide abortions or advertise for abortion.

IV. FACTUAL ALLEGATIONS

19. Plaintiffs Henderson and Keeler both pay state taxes and object to the use of their tax payments for administration of the Act.

20. Plaintiff Keeler also objects that there is no similar "Pro-Choice" prestige license plate to allow her to express her pro-choice view on her passenger car license plate.

21. Planned Parenthood would like to apply for and receive funds from the Defendant Kennedy under the Act in order to provide for the material needs of women who are considering placing the newborn child up for adoption if they carry the pregnancy to term, but is ineligible under La. Rev. Stat. § 463.61(F)(2) because it engages in referrals to abortion clinics and advertising that may be construed as "pro-abortion" advertising.

22. The Act necessarily requires that state taxpayer dollars will be used to make and distribute the license plates; establish and maintain the Council; and establish and maintain the Fund.

23. Upon information and belief, 200 license plates have been ordered by the Department of Public Safety and Corrections. Accordingly, state tax revenue will be expended on the production of these license plates.

24. The mandatory members of the Council, representatives from American Family Association, Louisiana Family Forum and Concerned Women for America, subscribe to and promote fundamentalist Christian beliefs.

25. The American Family Association publishes its Philosophical Statement on its website, including the following: "The American Family Association believes that God has communicated absolute truth to man and that all men are subject to the authority of God's Word at all times. Therefore, a culture based on Biblical truth best serves the well-being of our country, in accordance with the vision of our founding fathers."

26. The Louisiana Family Forum publishes its Core Values on its website, including the following: "We believe there is no part of human experience that does not hold God's intense interest. As Creator of humanity, He is fully and equally interested in the totality of that experience." The Louisiana Family Forum maintains a close working relationship with Focus on the Family and Family Research Council. Furthermore, its accomplishments include: promoting a National Day of Prayer Proclamation; and assisting with "Citizens for School Prayer" rally and follow-up activity.

27. Concerned Women for America posts a Statement of Faith on its website, including the following: "We believe the Bible to be the verbally inspired, inerrant Word of God and the final authority on faith and practice. . . . We believe it is our duty to serve God to the best of our ability and to pray for a moral and spiritual revival that will return this nation to the traditional values upon which it was founded."

28. Louisiana State Representative Shirley Bowler sponsored and drafted the Act. Upon information and belief, she recently stated, in reference to the Act, that "Louisiana is, traditionally, a very antiabortion state."

FIRST CLAIM FOR RELIEF

(Establishment Clause)

29. The allegations of paragraphs 1 through 28 are incorporated as though fully set forth herein.

30. The Act violates the First and Fourteenth Amendments of the United States Constitution and 42 U.S.C. § 1983 because it constitutes an impermissible establishment of religion.

SECOND CLAIM FOR RELIEF

(Freedom of Speech)

31. The allegations of paragraphs 1 through 30 are incorporated as though fully set forth herein.

32. The Act violates the First and Fourteenth Amendments and 42 U.S.C. § 1983 because it infringes upon freedom of speech.

THIRD CLAIM FOR RELIEF

(Due Process)

33. The allegations of paragraphs 1 through 32 are incorporated as though fully set forth herein.

34. The Act violates the Fourteenth Amendment's Due Process clause and 42 U.S.C. § 1983 because it conditions the receipt of funds from the Fund upon criteria that are so vague that they encourage discriminatory disbursements of money from the Fund and fail to give applicants for [sic] money form [sic] the Fund notice of what speech renders them ineligible.

ATTORNEYS' FEES

35. Plaintiffs are entitled to an award of reasonable attorneys' fees and expenses under 42 U.S.C. § 1988.

REQUEST FOR RELIEF

Plaintiffs respectfully request that the Court grant the following relief:

36. Enjoin La. R.S. 47:463.61 from further enforcement and declare that it is unconstitutional;

37. Award plaintiffs their costs and reasonable attorneys' fees; and

38. Grant such other relief as the Court may deem just and proper.

Respectfully submitted,

William E. Rittenberg
Rittenberg & Samuel, L.L.C.
714 Girod Street
New Orleans, LA 70130
(504) 524-5555
Bar #11287

Simon Heller*
Brigitte Amiri*
The Center for Reproductive
Law & Policy
120 Wall Street, 14th Floor
New York, NY 10005
(917) 637-3600

Attorneys for Plaintiffs

* Admitted *pro hac vice*

United States Constitution, Amendment X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Louisiana Constitution of 1974, Article 3, Section 16

16. (A) Specific Appropriation for One Year. Except as otherwise provided by this constitution, no money shall be withdrawn from the state treasury except through specific appropriation, and no appropriation shall be made under the heading of contingencies or for longer than one year.

(B) Origin in House of Representatives. All bills for raising revenue or appropriating money shall originate in the House of Representatives, but the Senate may propose or concur in amendments, as in other bills.

(C) The general appropriation bill shall be itemized and shall contain only appropriations for the ordinary operating expenses of government, public charities, pensions, and the public debt or interest thereon.

(D) Specific Purpose and Amount. All other bills for appropriating money shall be for a specific purpose and amount.

(E) Extraordinary Session. Except for expenses of the legislature, a bill appropriating money in an extraordinary session convened after final adjournment of the regular session in the last year of the term of office of a governor shall require the favorable vote of three-fourths of the elected members of each house.

Louisiana Revised Statute 47:505

A. The commissioner shall furnish to every owner whose vehicle should be registered, a plate of a style, pattern, design and construction as may be determined by the commissioner, provided however, that for purposes of enforcing the provisions of R.S. 32:62 B registration license plates issued to the owners of house trailers not equipped with brakes and of less than fifteen feet in length shall be the same in color and design as those issued to the owners of house trailers equipped with brakes and of not less than fifteen feet nor more than thirty-two feet in length. However, the commissioner shall issue to the owners of house trailers which are more than thirty-two feet in length, registration license plates of a color and design differing from those issued to the owners of house trailers of less than thirty-two feet in length.

B. The secretary of the Department of Public Safety and Corrections shall require the removal of all number plates upon termination of the lawful use thereof by the owner. Any dealer of motor vehicles who receives a previously owned vehicle with the intention of reselling such vehicle, shall remove the license or number plate from such vehicle before resale. After the dealer so removes the plate, he shall execute an affidavit attesting to that fact, and attach said affidavit to the title and registration. He shall notify the secretary on a monthly report listing all plates so removed and destroyed. The Department of Public Safety and Corrections, upon receipt of a transfer on such vehicle accompanied by the required affidavit, shall issue a new plate to the new owner in the same manner as if the vehicle had no plate issued to it. The knowing submission of a false affidavit shall be false swearing under R.S. 14:125.

C. Whenever a plate has been destroyed or rendered useless, the owner shall give notice thereof, including the number of such plate, to the commissioner. D. It is unlawful for any manufacturer or dealer to use or display a dealer's plate upon any vehicle not manufactured by such manufacturer or being bona fide demonstrated, sold, purchased, or exchanged by such dealer, or to permit such a dealer's plate to be used in any manner upon the vehicle belonging to himself or his employees, associates, agents, or representatives, or upon any vehicles being operated other than as an incident to and part of the legitimate object and purpose for which such plates are issued.

E. Except as otherwise provided herein, every number plate shall have displayed upon it the registration number assigned to the vehicle and to the owner thereof, the name of this state, which may be abbreviated, and the registration period for which it is issued. Such plates and the required letters and numerals thereon, except the registration period for which issued, shall be of sufficient size to be plainly readable from a distance of one hundred (100) feet during daylight. The commissioner may design and have constructed plates that may be used for more than one registration period when he deems it advisable to do so.

F. If it is established to the satisfaction of the commissioner that due to economic conditions or unavailability of materials it is impractical to issue license plates, he is authorized to provide windshield stickers or some similar means of evidence of payment of the tax and to require that owners of all kinds and types of trucks, semi-trailers, and trailers, stencil on the side or rear of each such vehicle the weight and type of registration purchased for the vehicle. If the commissioner provides windshield stickers

or some similar means of evidence of payment of the tax he shall not be required to issue new registration certificates, as provided in R.S. 47:504 for vehicles registered during the preceding registration period. G. Upon written request by the applicant, the commissioner may issue for commercial vehicles the same type of license plate issued to private passenger vehicles, provided that the cost of said plate shall be at the regular commercial rate.

H. The commissioner is hereby authorized to adopt the use of a number plate which may be retained in use by the owner of the licensed vehicle for as long as the plate remains legible, and to adopt the use of tabs or emblems which may be attached to the number plate to signify renewals thereof. The issuance and design of the number plates and the tabs or emblems therefor shall be executed under such rules and regulations as the commissioner may prescribe.

I. Upon written request by any applicant who possesses a citizen's band radio license, accompanied by proof of ownership of said license issued by the Federal Communications Commission, the commissioner may issue license plates bearing the call numbers issued to such applicant for the operation of a citizen's band radio. The costs of the issuance of said license to the applicant shall be the sum of fifty dollars plus the normal registration fee.